In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 844

HOWARD S. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 351 F.2d 598.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1965, and a petition for rehearing was denied on November 26, 1965. The petition for a

writ of certiorari was filed on December 23, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner's motion to postpone sentencing.

STATEMENT

Petitioner and five others were indicted in the United States District Court for the Southern District of California for violating 18 U.S.C. 1341 (mail fraud) and 15 U.S.C. 77q(a), 77x (fraud in the sale of securities) in connection with a real estate investment scheme (R. 1-38).[1] Petitioner and co-defendant McDonald were represented by the same retained counsel (R. 40, 41). On July 6, 1964, petitioner pleaded *nolo contendere* to all thirty counts of the indictment, and McDonald did the same as to three counts, whereupon their cases were referred for presentence report (R. 42). Prior to sentencing, the trial of the other co-defendants took place, at which petitioner, called by the government, testified for more than two days (see Tr. 5-6) and McDonald testified briefly for the defense (see Tr. 5).

On November 20, 1964, petitioner and McDonald came before the court for sentencing, and each asked for a continuance of 60 days. Their attorney having

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[1] "R." refers to volume I of the record on file in this Court. "Tr." refers to volume II, which contains the transcript of the sentencing proceedings.

expressed doubts in chambers as to whether McDonald's plea was voluntary, the court, without objection by the government, granted McDonald a continuance to enable him to move for withdrawal of his plea (Tr. 6).[2] As to petitioner, his counsel said that "in the office we did not discuss this motion as to both Mr. Miller and Mr. McDonald, but I do feel it should be made as to both of them, since I am representing both of them at the present time and I can't be entirely sure that there isn't a conflict of interest in my representing both of these men." The government opposed the motion as to petitioner, pointing out that, since petitioner had testified fully, the court had before it a sufficient record to indicate whether his plea was improvident (Tr. 5).

After denying petitioner's motion for a continuance (Tr. 6-7), the court heard a lengthy statement by petitioner (Tr. 8-29) and the remarks of petitioner's counsel, who stated that he had advised petitioner to put himself on the mercy of the court (Tr. 29-30). The court, commenting that it had an excellant presentence report and had heard petitioner testify and that petitioner was the "ring leader" of the venture, imposed concurrent sentences of three-years' imprisonment on each count (Tr. 36-39).[3]

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[2] This motion was subsequently filed and denied (R. 62).

[3] On November 25, 1964, petitioner filed a "protective" notice of appeal, "so that the defendant's right to appeal does not lapse prior to hearing of any motion to set aside the plea of guilty" (R. 47). In a motion for bail pending appeal, petitioner's counsel said that he was in the process of preparing a motion to set aside the *nolo* plea (R. 49). No such motion was ever filed.

In affirming the conviction and sentence, the court of appeals expressed the view that the appeal was frivolous and taken to delay service of the sentence (Pet. App. 5).

ARGUMENT

The only issue is whether the district court abused its discretion in denying the motion to continue the sentencing proceedings on a plea of *nolo contendere* which had been entered several months earlier. The court of appeals properly held that it did not. Whatever the situation with respect to McDonald (obviously a lesser figure in the scheme), there is no basis for a suggestion that petitioner's plea had not been knowingly and voluntarily entered. Nor did petitioner's attorney state that there actually had been a conflict of interest; he said only that he felt that he ought to consider the possibility of such a conflict. Since a genuine issue of conflict of interest could be raised by a motion under 28 U.S.C. 2255 (see *United States* v. *Hayman*, 342 U.S. 205), the attorney's suggestion of his need to consider the possibility of such a conflict hardly necessitated a delay in imposing sentence.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
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Attorney.

JANUARY 1966.

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